(3)

89-676

No. _____

Supreme Court, U.S.
FILED
NOV 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

LEOZIE and CAROL PEARSON,
Petitioners,

vs.

HARRISON DUCK,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

John E. Holcomb,
Counsel of Record
Keith L. Pryatel
MILLISOR & NOBIL
430 Quaker Square
Akron, OH 44308
(216) 253-5500

Counsel for
Respondent

QUESTIONS PRESENTED

1. Whether a criminal misdemeanor conviction of a black defendant following a bench trial by a municipal judge who was not alleged to have engaged in any wrong doing whatsoever, as a matter of law establishes "probable cause" so as to defeat an alleged civil rights malicious prosecution cause of action anchored only under the "like punishment" provision of 42 U.S.C. § 1981, and pursued solely against the private citizen who reported the crime?

2. Whether the allegation of a conspiracy in a civil rights complaint defeats a testifying witness' absolute immunity?

3. Whether a civil rights plaintiff alleging a race-based malicious prosecution cause of action and conspiracy between a white private citizen and black city law director to convict a black private citizen of a misdemeanor crime can properly pursue his claims in the absence of pleading alleged violations of 42 U.S.C. § 1983 or 42 U.S.C. § 1985?

4. Whether Petitioners sufficiently plead their alleged civil rights conspiracy under 42 U.S.C. § 1981?

5. Whether rights secured under the Fifth and Fourteenth Amendments to the United States Constitution are subject to redress under 42 U.S.C. § 1981, rather than 42 U.S.C. § 1983, so as to render meaningless the exhibition of federal or state action?

Table of Contents

	Page
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutory and Constitutional Provisions Involved	2
Statement of the Case	6
Reason for Denying Discretionary Review	13
I. The Decision By The Sixth Circuit Does Not Present A Conflict With The Decisions Of Any Other Federal Court Of Appeals Or Of This Court, And Did Not Decide An Important Question Of Federal Law Not Already Settled By This Court	13
Conclusion	30

Table of Authorities

Page

Cases:

Baker v. McCollan, 443 U.S. 137 (1979)..... 29
Brinkmann v. Johnston, 793 F.2d 111 (5th Cir. 1986)..... 28
Briscoe v. Lahue, 460 U.S. 325 (2983)..... 19
Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977)..... 9
Courtney v. Rice, 46 Ohio App. 3d 133 (1988)..... 17
Dennis v. Sparks, 449 U.S. 24 (1980)..... 17
Great Amer. Fed. S&L v. Novotny, 442 U.S. 366 (1985)..... 25
Hale v. Hainey, 786 F.2d 688 (5th Cir. 1986)..... 27
Howell v. Tanner, 650 F.2d 610 (11th Cir. 1981), cert. denied, 456 U.S. 918 (1982)..... 17
Jett v. Dallas Indep. School Dist., ___U.S.___, 57 U.S.L.W. 4858 (1989)..... 15
Lee v. Town of Estes Park, 820 F.2d 1112 (10th Cir. 1987)..... 27

Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978)..... 27
Manis v. Sterling, 862 F.2d 679 (8th Cir. 1988)..... 28
McCarthy v. Mayo, 827 F.2d 1310 (9th Cir. 1987)..... 28
Miller v. Duffin, 637 F.Supp. 496 (N.D. Ill. 1986)..... 28
Moses v. Park Watikar, 813 F.2d 891 (8th Cir. 1987), cert. denied, 108 S.Ct. 108 (1987)..... 20
Patterson v. McLean Credit Union, 491 U.S. ___, 109 S.Ct. 2363 (1989)..... 15
Papasan v. Allan, 478 U.S. 265 (1986)..... 26
Shelley v. Kramer, 334 U.S. 1 (1948)..... 29
Statler v. Johnson, 857 F.2d 224 (4th Cir. 1988)..... 23
Tauriac v. Polaroid, 48 Fair. Empl. Prac. 1256 (D. Mass. 1989)..... 30
Terkett v. Lund, 623 F.2d 29 (7th Cir. 1980)..... 16
The Civil Rights Cases, 109 U.S. 3 (1883)..... 29
Tower v. Glover, 467 U.S. 914 (1984)..... 17
Walters v. Village of Oak Lawn, 548 F. Supp. 417 (D.C. Ill. 1985)..... 30
Wellman v. State of W. Va., 637 F. Supp. 135 (D.W.Va. 1986).. 22

Page

Statutes

Ohio Rev. Code § 2917.21..... 6
Ohio Rev. Code § 2305.11..... 9
Ohio Rev. Code § 2945.71..... 9
Ohio Rev. Code § 309.08.....

42 U.S.C. § 1981.....passim
42 U.S.C. § 1988.....passim
42 U.S.C. § 1985..... 25

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

LEOZIE and CAROL PEARSON,
Petitioners,

vs.

HARRISON DUCK,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the United States Court of Appeals for the Sixth Circuit is reproduced in the Petition at App. 106. The unpublished opinion of the United States District Court for the Northern District of Ohio is reproduced at App. 81.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 4, 1989. Petitioners' request for rehearing and rehearing en banc was denied by the Court of Appeals by judgment entered July 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Ohio Rev. Code § 2917.21
Telephone harassment.

(A) No person shall knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller does any of the following:

(1) Fails to identify himself to the recipient of the telephone call and

makes the telephone call with purpose to harass, abuse, or annoy any person at the premises to which the telephone call is made...

42 U.S.C. § 1981
Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1985(2),(3)
(2) Obstructing justice; intimidating party, witness, or juror.

If two or more persons in any State or Territory conspire. . . for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of

persons, to the equal protection of the laws. . .

(3) Depriving persons of rights or privileges.

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws. . .

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT 5

Criminal actions-Provisions concerning-due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner, Leozie Pearson, Jr., a black citizen residing in East Liverpool, Ohio, was served with a criminal summons and complaint for misdemeanor telephone harassment on September 16, 1983.[1]/ The criminal

---

[1]/ Ohio Rev. Code § 2917.21(A)(1) provides that it is a first degree misdemeanor to:

> [K]nowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller...[f]ails to identify himself to the recipient of the telephone call with purpose to harass, abuse or

FOOTNOTE CONTINUED ON NEXT PAGE

activity was brought to the attention of local authorities by Respondent, Mr. Harrison Duck, a white, self-employed life insurance salesman also residing in East Liverpool, Ohio. The fact harassing telephone calls were placed to the Duck residence from a telephone under the control of Petitioners by their son was established at the criminal trial through a trap device placed on the Duck telephone by the Ohio Bell Telephone Company. The fact harassing calls were indeed made is conceded here (Pet. at 4-5). The

---

> annoy any person at the premises to which the telephone call is made...

The owner of a telephone who permits harassing phone calls to be placed is thus just as guilty as the caller.

complaint was brought in the name of the State of Ohio after the City's Law Director, Mr. Hayes Taylor, also a black citizen of East Liverpool found sufficient probable cause to convict. After the state's criminal complaint issued Petitioner Carol Pearson sought to bring similar, and retaliatory criminal charges against Respondent which Taylor refused to prosecute.

Petitioner plead not guilty, and was tried with benefit of counsel before Municipal Judge Paul Tobin. Respondent was subpoenaed to testify as a witness for the state. On March 8, 1984, Petitioner was found guilty of telephone harassment, sentenced to thirty days in jail and fined two-hundred and fifty

dollars, although these penalties were suspended with costs. Petitioner's conviction was reversed on June 25, 1985 due to the state's failure to try him within the time constraints of Ohio's "speedy trial" provisions, Ohio Rev. Code § 2945.71 (App. 109).

For nearly two years, Petitioner sat quietly by, and accepted his alleged malicious prosecution.[2]/ Petitioners then filed a complaint in

---

[2]/ By doing so, Petitioner lost his right to pursue abuse of process or malicious prosecution tort type civil claims which are subject to a one-year limitations period in Ohio. See Ohio Rev. Code §2305.11. This limitations period, at the time the federal complaint below was filed, also barred any federal civil rights malicious prosection cause of action under 42 U.S.C. §1983 or §1985. See Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977).

federal court naming as the sole defendant Mr. Harrison Duck which alleged four causes of action under apparently five theories of recovery. The federal claim arose under "42 U.S.C. §1981, and the First, Fifth and Fourteenth Amendments to the United States Constitution"(Compl. ¶1), and alleged that because Petitioner was forced to go through the rigors of a criminal trial, and thus expended money for attorneys fees, Respondent interferred on racial grounds with his telephone "contract" in violation of 42 U.S.C. §1981 (Compl. ¶26), although that contract was never breached, discontinued, nor resulted in increased service rates. The remainder of the

claims were pendant, and alleged intentional interference with the telephone contract under state law, loss of consortium on behalf of Carol Pearson, Petitioner's spouse, and loss of consortium of Mrs. Pearson as to her son.

On December 31, 1987, Judge David D. Dowd, Jr. of the Northern District of Ohio dismissed the complaint on Respondent's motion after reviewing Petitioners' pleadings and finding, "[t]here is no indication that the plaintiffs' telephone service was disrupted or discontinued as a result of his criminal charge", "there has been no allegation that the telephone company or the defendant has refused to contract with the plaintiff

on the basis of his race" and, "[t]here is no allegation the plaintiffs have been interferred with in their contractual relationship between the telephone company and the plaintiffs" (App. 100). Petitioners appealed and the Sixth Circuit affirmed for identical reasons, while also speaking to Petitioners allegations that their similar, retaliatory criminal charges against Duck were not pursued by the state. The circuit court held that Respondent acting alone could not have caused this harm.

Petitioners requested rehearing and/or rehearing en banc, drastically changing their theories of recovery in order to bolster their motions for

reconsideration. The Sixth Circuit denied both motions on July 27, 1989.

REASON FOR DENYING DISCRETIONARY REVIEW

I. THE DECISION BY THE SIXTH CIRCUIT DOES NOT PRESENT A CONFLICT WITH THE DECISIONS OF ANY OTHER FEDERAL COURT OF APPEALS OR OF THIS COURT, AND DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW NOT ALREADY SETTLED BY THIS COURT.

This is what Petitioners told Judge Dowd about their complaint before him:

> In Defendant's Memorandum at 8 n.4, Defendant misstates Ohio law, regarding the statute of limitations for civil claims of malicious prosecution. While Plaintiffs' actions herein are not analogous to such claims, but are more in the nature of a tortious interference with contract claim, ...

(Br. In Opp. to Mot. Dismiss. at n.2). After the Sixth Circuit decided not to retroactively apply its uniform limitations period for civil rights complaints, Petitioners magically transformed their complaint to one of malicious prosecution without even amending their pleading. This is why Judge Dowd did not address the malicious prosecution nature of this complaint, and why this court should likewise refuse to do so.

With this petition comes the candid, albeit tardy concession that a black person charged and convicted of misdemeanor telephone harassment, such conviction later overturned due to the lack of a speedy trial, cannot state a

claim for interference with a contract violative of those federal rights protected under 42 U.S.C. §1981, due solely to the expenditure of defense attorneys fees where the underlying telephone service was never breached or disrupted (Pet. n.3). The new §1981 theory, be it termed malicious or selective prosecution, is not quite as bizarre as the first, but it is as equally meritless in light of this Court's decisions just last term in Patterson v. McLean Credit Union, 491 U.S. ___, 109 S.Ct. 2363 (1989) and Jett v. Dallas Indep. School Dist., ___ U.S. ___ 57 U.S.L.W. 4858 (1989).

A primary impediment to Petitioners malicious prosecution theory is the

pleading of probable cause. If the underlying malicious prosecution civil rights claim fails, the fact the term "conspiracy" appears in a complaint hardly matters. Terkett v. Lund, 623 F.2d 29, n.4 (7th Cir. 1980). Petitioner expressly plead that he was found guilty of the crimes charged (Compl. ¶13), and that the endless telephone calls to Respondent's residence originated from his house (Id. ¶ 20, 21). Although a conspiracy between the black law director and Respondent to bring these charges against Petitioner may arguably be read somewhere in the complaint, there is absolutely no allegation that Judge Tobin who found Petitioner guilty

engaged in any hanky panky. The fact Petitioner's conviction was overturned on speedy trial grounds (App. 109) does nothing to vitiate probable cause so as to defeat a civil rights malicious prosecution claim. Howell v. Tanner, 650 F.2d 610, n.6 (11th Cir. 1981), cert denied, 456 U.S. 918 (1982); Courtney v. Rice, 46 Ohio App. 3d 133 (1988). To the extent the complaint may allege that the prosecution of their son was malicious, he plead guilty to the charges by the state.

In both Tower v. Glover, 467 U.S. 914 (1984) and Dennis v. Sparks, 449 U.S. 24 (1980)(Pet. 19), due process actions under 42 U.S.C. § 1983--not §1981--the civil rights plaintiffs alleged that the judge was inextricably

intertwined in the conspiracy, thereby stating a prima facie due process violation. 449 U.S. at 25; 467 U.S. at 916. That is not the case here, even assuming the "equal benefits" and "like punishment" provisions of § 1981 apply.[3]/ Tower and Dennis are also distinguishable because here Petitioners never alleged the criminal charges were filed pursuant to a conspiracy (Compl. ¶9), never alleged the criminal summons and complaint was issued as part of a conspiracy (Id. at 10), never alleged

---

[3]/ These provisions of § 1981 originated from the post-civil war Black Codes which by statute proscribed different and more onerous penalties for violations of laws for blacks than whites. No such statute was ever alleged to exist here, nor was the punishment imposed by Judge Tobin alleged to be discriminatory.

the criminal complaint was filed in a conspiracy (Id. at 11), and never alleged the conviction entered by the Municipal Judge was part of a conspiracy. This conscious decision was undertaken so as to skirt the limitations period which barred a civil rights malicious prosecution claim in Ohio. Supra, n.2. To now allow Petitioners to re-cast their claims here as a basis for discretionary review is unprecedented.

Tower and Dennis also involved conspiracies where the private co-conspirator was not entitled to any immunity. Testifying witnesses in criminal cases enjoy absolute immunity. Briscoe v. Lahue, 460 U.S. 325 (1983). An alleged conspiracy does nothing to

change this result. Briscoe n.7; Moses v. Parkwatikar, 813 F.2d 891 (8th Cir. 1987), cert. denied, 108 S.Ct. 108 (1987). Also, in Tower where the underlying action was criminal and brought in the name of the state, all state officials were in fact joined as defendants. 467 U.S. 918.

As to the selective prosecution nature of the complaint, Petitioners once again plead themselves from recovery. Paragraph twenty-four alleged that "The City of East Liverpool, by and

through Taylor and Payne"[4] / knew Respondent's daughter was making calls "as described in paragraph twenty (20), but refused to process [similar] charges made by Plaintiffs..." (Compl. ¶24). Paragraph twenty, in turn, avered that any calls made by Respondent's white daughter to Petitioners "...were not made with a purpose to abuse, threaten, annoy or harass another person" (Compl. ¶20). What Petitioners asked for below was a decision that the City's election,

---

[4] / There was no allegation that the City's, Payne's or Taylor's decision not to prosecute was in conspiracy with Respondent. For this reason, the Sixth Circuit's decision regarding failure to name and join these defendants was proper and not at odds with Dennis or Tower. Private citizens in Ohio have no authority to decide which cases to prosecute and which not. Ohio Rev. Code § 309.08.

conspiratorial or otherwise, not to prosecute Respondent's white daughter for conduct admittedly not violative of Ohio Rev. Code § 2917.21(A) somehow violated § 1981. Judge Dowd correctly ignored this absurd theory. Moreover, it has been routinely held that there is no civil rights guarantee to have criminal charges brought to prosecution, even if Petitioners had plead Respondent's daughter's actions violated state law. See Wellman v. State of W.Va., 637 F. Supp. 135, 138 (D. W.Va. 1986)("Adding conspiracy with private persons to his claim against the prosecutor for failure tc prosecute will not make the failure to prosecute actionable", granting 12(B) dismissal);

Statler v. Johnson, 857 F.2d 224, 227 (4th Cir. 1988)(dismissing conspiracy not to prosecute under §1983).

A more serious problem with this complaint is this Court's recent interpretations of § 1981. In Jett v. Dallas Ind. School Dist., supra, the Court examined whether § 1981 could provide an independent basis for liability against state actors in the face of § 1983. The Court's opinion is worth repeating here:

> We think the history of the 1866 Act and the 1871 Act recounted above indicates that Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981. That we have read § 1 of the 1866 Act to reach private action and

have implied a damages remedy to effectuate the declaration of rights contained in that provision does not authorize us to do so in the context of the "state action" portion of § 1981, where Congress has established its own remedial scheme. In the context of the application of § 1981 and § 1982 to private actors; we "had no choice but to hold that aggrieved individuals could enforce this prohibition, for there existed no other remedy to address such violations of the statute." Cannon, 441 U.S. at 728 (White, J. dissenting)(emphasis added; footnote omitted). That is manifestly not the case here, and whatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute. See National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453, 458 (1974)("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the

coverage of the statute to subsume other remedies").

57 U.S.L.W. 4858, 4866-67. Accord Patterson v. McLean Credit Union, ___ U.S. ___, 109 S.Ct. 2363, 2375 (1989)("We should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a latter statute"). The statute for pursuing allegations of a civil rights conspiracy is clearly expressed under 42 U.S.C. § 1985 (2), (3). Those sections provide no substantive rights of their own but only a vehicle to redress violation of other constitutional and civil rights. Great American Fed. S&L v. Novotny, 442 U.S. 366, 376 (1985). Section 1985 would be rendered a "dead letter"

[Patterson, 109 S.Ct. at 2375] if Petitioner is free to pursue an alleged civil rights conspiracy without invoking § 1985.

Even so, the pleading in this case falls well short of the specificity required to state a claim. This court has already approved of a 12(B) dismissal of an identical, conclusory civil rights conspiracy in Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981). See Papasan v. Allan, 478 U.S. 265, 286 (1986)("Although for purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation" citing Briscoe). The word

"conspiracy" is buried in a single paragraph of this complaint just prior to Petitioners' verbatim reiteration of § 1981 (Compl. ¶26).[5]/ The circuit court found an insufficiency of pleading a conspiracy (App. 110). This is the precise type of "conspiracy" pleading subject to summary dismissal. See Hale v. Harney, 786 F.2d 688 (5th Cir. 1986)(dismissal of civil rights

---

[5]/ The only allegation of "state action" appears at ¶9 where Petitioners alleged Respondent "act[ed] under color of state law" in filing the criminal charges with the City or its officials. Of course, simply reporting a crime is not the equivalent of state action. Lee v. Town of Estes Park, Colo., 820 F.2d 1112, 1115 (10th Cir. 1987). Those courts that have considered the issue have found a state action component to the "like benefit" provisions of § 1981. Mahone v. Waddle, 564 F.2d 1018, 1029 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978).

conspiracy between judge and wife granted due to conclusory pleading); Miller v. Duffin, 637 F.Supp. 496 (N.D. Ill. 1986); Brinkmann v. Johnston, 793 F.2d 111 (5th Cir. 1986); Manis v. Sterling, 862 F.2d 679 (8th Cir. 1988); McCarthy v. Mayo, 827 F.2d 1310 (9th Cir. 1987).

The constitutional claims under the Fifth and Fourteenth Amendments (Pet. n.4) are interesting because acceptance of them would obliterate the necessity of ever again exhibiting "state" or "federal" action in order to state a claim for relief. It is important to remember that the exclusive predicate of this complaint was § 1981. This court has previously held 42 U.S.C. § 1983,

while providing no substantive rights of its own, was passed precisely to remedy deprivations of constitutional and civil rights. Baker v. McCollan, 443 U.S. 137 (1979). If Petitioners are correct, and these constitutional provisions are now subject to redress under § 1981, § 1983 has also become a "dead letter". Moreover, acceptance of this position would effectively overrule The Civil Rights Cases, 109 U.S. 3 (1883) and Shelley v. Kramer, 334 U.S. 1 (1948) since the "state action" component of these constitutional provisions would disappear under § 1981 which Petitioners

contend reaches purely private conduct (Pet. 24).[6]/

CONCLUSION

The petition should be denied as it presents an action not in conflict among the circuits or this Court, and presents

---

6/ Petitioners boldly request that the court consider remand of their pendant claims if this court were to accept their Petition, and if this court were further to reverse the opinions of both lower courts (Pet. n.3). This request is untenable considering that Petitioners have not appealed here their "interference with contract" § 1981 civil rights claim (Id.), and Count II was precisely a pendant "interference with contract" claim. The remaining claims were for loss of consortium which the federal courts have conclusively established may not spring from alleged civil rights violations. Walters v. Village of Oak Lawn, 548 F. Supp. 417 (D.C. Ill. 1985); Tauriac v. Polaroid Corp., 48 Fair Empl. Prac. Cas.(BNA) 1256 (D. Mass. 1989). These claims have already been pursued through the state courts.

an issue not already decided by this Court.

Respectfully submitted,

John E. Holcomb
Counsel of Record
Keith L. Pryatel
MILLISOR & NOBIL
430 Quaker Square
Akron, OH 44308
(216) 253-5500

Counsel for Respondent

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondent in Opposition was served on Dennis Haines, Fourth Floor, Dollar Bank Bldg., P. O. Box 849, Youngstown, OH 44501, by certified mail, return receipt requested, this 22nd day of November, 1989.

John E. Holcomb